

**STATE OF MAINE**

**DEPARTMENT OF MARINE RESOURCES**

<b>IN THE MATTER OF THE APPLICATION OF ) PORT CLYDE OYSTER COMPANY FOR A ) LIMITED-PURPOSE AQUACULTURE LEASE ) LOCATED IN THE ST. GEORGE RIVER, SOUTH ) OF HAWTHORNE POINT, TENANTS HARBOR, ) KNOX COUNTY, MAINE )</b>	<b>) ) ) ) ) )</b>	<b>FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION</b>
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On July 18, 2001, Port Clyde Oyster Company of Tenants Harbor, Maine applied for a limited-purpose (experimental) commercial type, aquaculture lease totaling 2 acres in the coastal waters of the State of Maine, located in the St. George River, south of Hawthorne Point in Tenants Harbor, Knox County, Maine. The applicant requested the lease for a term of three (3) years for the purpose of cultivating American oysters (Crassostrea virginica), and hard clams (Mercenaria mercenaria) using suspended culture techniques. The application was accepted as complete on September 24, 2001. A public hearing on this application was held on March 12, 2003 at 7:00 p.m. in St. George.

Intervenor status was granted to the Town of St. George, represented by Harbormaster David Schmanska, and riparian landowners Mr. and Mrs. Barry Cook, represented by Jay Cook (hereafter referred to as Intervenor Schmanska and Intervenor Cook).

Approval of limited-purpose aquaculture leases is governed by 12 M.R.S.A. §6072-A. This statute provides that a limited-purpose lease may be granted by the Commissioner of the Department of Marine Resources (DMR) if it is determined that the project will not unreasonably interfere with the ingress and egress of riparian owners; navigation; fishing or other uses of the area, taking into consideration the number and density of aquaculture leases; the ability of the site and surrounding areas to support ecologically significant flora and fauna; or the use or enjoyment within 1,000 feet of municipally, state or federally owned beaches, parks, or docking

facilities. The Commissioner must also determine that the applicant has demonstrated that there is an available source of organisms to be cultured for the lease site.

**Evidence Introduced Concerning the Nature  
and Impact of the Proposed Lease**

The evidentiary record before the Department regarding this lease application includes the Department file (Exhibit 1), including the application (Exhibit 2) and the Department site report (Exhibit 3), and the record of the March 12, 2003 public hearing. At the public hearing, testimony was given by the applicant, Timothy Dowling, the Department's Aquaculture Environmental Coordinator, Jon Lewis, Intervenor Schmanska, Intervenor Cook, and five members of the public.

According to the application and the testimony by the applicant, the proposed experimental lease is sought to determine the commercial viability of raising American oysters and hard clams. The applicant requests a lease site totaling two (2) acres and a lease term of three (3) years. The applicant testified that the coordinates of the proposed lease were modified slightly from those set forth in the application. He indicated that the coordinates in the Department's site report are the correct coordinates for the lease site.

The applicant testified that his method of growing shellfish has changed since he applied for the lease. He stated that he would not be floating racks as proposed in the lease application. Rather, the proposed lease activities would consist of growing shellfish on 10' x 10' x 4' tables that will sit on the bottom of the lease site. The tables will have a top made of 3-inch wire mesh and a nylon purse net will sit on top of each table. Divers will place the shellfish on top of the purse nets. Tables containing smaller oysters will have covers to keep out predators. When necessary for cleaning, grading or harvesting, the shellfish will be brought to the surface from a barge in the purse nets. Divers may also harvest the shellfish. The applicant may also deploy 36" x 36" x 40" racks on the bottom containing ADPI bags. The applicant testified that he will be present at the lease site approximately two to three weeks in the spring to set up the gear, and 2 to 3 days per week during the summer for periodic cleaning and grading and for harvesting. In

order to remove silt, the gear will be power-washed on the lease site. In November activity at the lease site will end for the winter, and the shellfish will remain on the bottom. The proposed lease site would be accessed by boat from the Port Clyde Town Ramp. According to the application, all seed shellfish would be obtained from the hatcheries of Pemaquid Oyster in Bremen, Maine, Marshall Point Sea Farm in Port Clyde, Maine, and Mook Sea Farm in Damariscotta, Maine.

In accordance with Department regulations, Chapter 2.64(2), the applicant provided an environmental characterization of the proposed lease area. According to the application, the river bottom at the proposed lease site consists of soft mud. The area is relatively flat with little or no vegetation. The depths are estimated to be 3 to 9 feet at low tide and 12 to 20 feet at high tide. The current flow is estimated to be an average of one knot and flows in an easterly direction. The applicant testified that he chose this particular location because of the salinity, protection from severe weather, location in relation to riparian land and existing uses of the area, and proximity to his base of operations.

The applicant provided a written statement by St. George Harbormaster, David Schmanska, regarding the existing uses of the proposed lease site. Mr. Schmanska stated that he visited the proposed lease area and found no evidence of lobstering. He also stated that there are no moorings or docks close enough to be of concern. Mr. Schmanska further indicated that he checked with local fishermen, who assured him that due to the composition of the bottom and other factors, this was not an area where traps would likely be set. Because of the close proximity to ledges on the southwest side of the proposed lease area, Mr. Schmanska stated that he did not see any problems arising with navigation or anchoring. In his opinion, the proposed lease area is an ideal spot for an aquaculture lease as it would have little or no effect on current uses of the area.

The applicant testified that navigation on the river should not be affected due to the proposed lease site's location between a shoal to the southwest and Hawthorne Point to the northeast. The applicant testified that there is no lobster fishing in the proposed lease area, and there is some recreational activity. He also testified that the structures on the site may

encourage fish to come to the area. He stated that he would agree to a lease condition that would allow recreational fishing on the lease area.

The Department's Aquaculture Environmental Coordinator (AEC) and his assistant conducted a site visit at the proposed lease area on May 24, 2002. The AEC created a site report summarizing the information obtained during the site visit and provided testimony regarding the site report at the public hearing. According to the report and the AEC's testimony, the proposed site is located south of Hawthorne Point, approximately 172.78 feet from the nearest point on the northern shore and 100.79 feet from the nearest point on the eastern shore. The proposed site is located in shallow water depths ranging approximately from 3 to 9 feet at low tide, and is situated approximately 840 east of the main navigational channel of the St. George River.

According to the AEC, no moorings or docks were observed within the area of the proposed lease site. The nearest dock and moorings are located near Tenpound Island in Otis Cove. The AEC stated in the site report that the proposed lease activities are not expected to interfere with riparian ingress and egress.

According to the AEC, the proposed activities will not interfere with navigation. Due to the proximity of the proposed lease site to an intertidal ledge and the shallow water depths, little vessel traffic is expected. According to the AEC, smaller vessels should be able to adequately navigate between shore and the proposed site.

The AEC testified that no fishing activity was observed within the area of the proposed lease site. The nearest lobster trap buoys were located to the west and southwest of the proposed site. According to the AEC, the nearest aquaculture lease is located 2,037 feet southwest of the proposed site. There are six other aquaculture sites in the St. George River, located 5,949 feet to 4.29 nautical miles from the proposed lease site.

The AEC contacted St. George Harbormaster David Schmanska regarding the lease application. Mr. Schmanska indicated that little fishing or vessel traffic is expected in the area of the proposed lease site due to the bottom composition and geography of the site. Additionally,

Mr. Schmanska stated that the proposed activities would have little interference with moorings in the area. He indicated that a riparian owner has expressed interest in having a mooring in the same general area as the proposed lease site, but that the two could co-exist.

According to the AEC's report, there is a harbor seal haul-out adjacent to the southern end of the proposed lease site. However, according to the report, the proposed lease activity is not likely to have any more impact on seals than other fishing and recreational activities in the area. The AEC testified that the applicant should be aware of the haul-out and to locate any moorings associated with the lease on the northeast part of the lease, away from the seals. He stated that the seals' pupping season is from mid May to mid June, and the applicant should take care during this time not to disturb the seals. He testified that the seals will haul out at low tide, and therefore, the applicant should attempt to conduct the more disturbing activities, such as power washing, on the lease site at high tide. He recommended that any use of a pump be on the northern end of the lease. He also testified that, in his opinion, the seals will habituate quickly to the lease activities.

The AEC also expressed a concern regarding adequate marking of submerged gear. According to the AEC's report, due to the height of the proposed gear and the shallow water depths, the applicant will need to mark at least both ends of the rack lines and intermittently along the lines to minimize the likelihood of prop strikes.

According to the AEC's report the proposed lease is located in an area classified as open for the harvest of shellfish by the Department's Water Quality Division. Also, according to the report the proposed lease site is not located in an "Essential or Significant Wildlife Habitat" regulated by the Department of Inland Fisheries and Wildlife (IF&W).

Jay Cook, representing intervenors Patricia and Barry Cook, testified at the hearing. He stated that his brother, Barry Cook, was concerned with the potential future expansion of the lease site and the effect of the lease on the value of his riparian property.

David Schmanska, representing the Town of St. George, also provided testimony at the public hearing. He stated that the public should report any disturbance to the seals to DMR, and

to document such observations. He also expressed a concern for adequate marking of the submerged gear and lines.

Additionally, several members of the public provided testimony in support of the proposed lease.

### **Findings of Fact**

The proposed lease is located south of Hawthorne Point, approximately 172.72 feet from the nearest point on the northern shore. Access to the proposed lease would be by boat from the Port Clyde Town Ramp. There are no docks or moorings located in the area of the proposed lease site. No use of riparian land was requested or required. Based on this evidence, I find that the lease will not unreasonably interfere with the ingress and egress of riparian owners.

The proposed lease is located in shallow water depths of approximately 3 to 9 feet at low tide, approximately 840 feet from the main navigational channel of the St. George River. Navigation in the area consists of very little vessel traffic, due to the proximity of the proposed lease site to an intertidal ledge and the shallow water depths. Based on the foregoing, I find that the proposed lease will not unreasonably interfere with navigation. However, due to the shallow water depths and the height of the submerged gear, all submerged gear must be marked adequately, so as to warn potential navigators of their location.

Little fishing activity is expected in the area of the proposed lease, due to bottom composition and geography of the area. The nearest existing aquaculture lease is located 2,037 feet southwest of the proposed lease site. The area of the proposed lease is classified as “open” for the harvest of shellfish. The applicant will allow recreational fishing and boating on the lease site. I find that the proposed lease will not unreasonably interfere with fishing or other uses of the area.

The bottom of the proposed lease site consists of soft mud with little or no vegetation. The current flow is estimated to be an average of one knot. There is a harbor seal haul-out located adjacent to the southern portion of the proposed lease site. However, as long as the applicant locates any moorings on the northeast portion of the lease area, and conducts the

power-washing on the northern end of the lease when seals are present, the lease activities will not interfere with the seals. Based on this evidence, I find that the proposed activities will not unreasonably interfere with the ability of the site and surrounding areas to support existing ecologically significant flora and fauna.

All seed shellfish will be obtained from the hatcheries of Pemaquid Oyster in Bremen, Maine, Marshall Point Sea Farm in Port Clyde, Maine and Mook Sea Farm in Damariscotta, Maine. Based on this evidence, I find that there is an available source of American oysters and hard clams.

The proposed lease site is not located within 1,000 feet of any public beaches, parks or docking facilities. Based on this evidence, I find that the proposed lease site activities will not unreasonably interfere with public use or enjoyment within 1,000 feet of any municipally, state, or federally owned beaches, parks, or docking facilities.

### **Conclusions of Law**

Based on the above findings, I conclude that:

1. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner;
2. The aquaculture activities proposed for this site will not unreasonably interfere with navigation;
3. The aquaculture activities proposed for this site will not unreasonably interfere with fishing or other uses of the area, taking into consideration the number and density of aquaculture leases in the area;
4. The aquaculture activities proposed for this site will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna, provided that the applicant locates all moorings and conducts all power-washing on the northern end of the lease when seals are present;
5. The applicant has demonstrated that there is an available source of American oysters and hard clams to be cultured for the lease site; and
6. The aquaculture activities proposed for this site will not unreasonably interfere with public use or enjoyment within 1,000 feet of municipally, state or federally owned beaches, parks, or docking facilities.

Accordingly, the evidence in the record supports a finding that the proposed aquaculture activities meet the requirements for the granting of an aquaculture lease set forth in 12 M.R.S.A. §6072-A.

### **Decision**

Based on the foregoing, the Commissioner grants the applicant's requested limited-purpose commercial lease of 2.0 acres to the applicant from the date of this decision for the purpose of cultivating American oysters (Crassostrea virginica), and hard clams (Mercenaria mercenaria) using suspended culture techniques. The applicant shall pay the State of Maine rent in the amount of \$50.00 per acre per year. The applicant shall post a bond or establish an escrow in the amount of \$1,500 if the total square footage of all structures on the lease is less than or equal to 400 square feet or \$5,000 if the total square footage of all structures on the lease is greater than 400 square feet. A limited-purpose lease for commercial aquaculture research and development conveys only those rights specified in the lease.

### **Conditions to be Imposed on Lease**

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities. Conditions are designed to encourage the greatest multiple, compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the aquaculture law.

The following conditions are placed on this lease:

- (1) navigation, lobster fishing and recreational boating and fishing shall be allowed on the lease;
- (2) the lease area shall be marked in accordance with U.S. Coast Guard and Department of Marine Resources regulations Chapter 2.80;
- (3) all submerged gear shall be marked on the surface with lobster buoys, so as to alert a prudent navigator of the location of the gear;
- (4) all moorings associated with the lease activities shall be located on the northern end of the lease area, and all power washing shall take place in the northern portion of the



lease when seals are present, so as not to disturb the harbor seal haul-out adjacent to the southern end of the lease area; and

- (5) the applicant shall comply with the Marine Mammal Protection Act, 16 U.S.C.A. § 1361.

The Commissioner may commence revocation procedures if he determines that substantial aquaculture has not been conducted within the preceding year or that the lease activities are substantially injurious to marine organisms. If any of the conditions or requirements imposed in this decision, in the lease, or in the law are not being observed, the Commissioner may revoke the aquaculture lease.

**Dated:** \_\_\_\_\_

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**George D. Lapointe (Commissioner)**  
**Department of Marine Resources**